No. 20-866

IN THE
Supreme Court of the United States

FRANCESCA ALLEN, ET AL.,
Petitioners,

v.

WELLS FARGO & COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

In its opposition, Wells Fargo does not seriously contest what this Court recognized last term: The lower courts are sharply divided over the proper application of this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). Instead, Wells Fargo argues that the lower courts' confusion should be left to fester because this case is a poor vehicle for resolving it.

That is wrong twice over. Not only is there a pressing need for this Court's guidance, but the decision below provides a perfect vehicle to resolve the issues left open last term. The Eighth Circuit below expressly read *Dudenhoeffer* to impose a heightened pleading standard on ESOP duty-of-prudence claims, aligning itself with the Fifth and Sixth Circuits while putting its own stringent spin on that approach. And nothing about this case will reprise the problems that emerged last term in *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020). There is no concern that the securities laws and ERISA point in different directions here, and resolving the confusion over what *Dudenhoeffer* says about pleading duty-of-prudence claims does not turn on a defendant's call to *overrule* it—especially since, given the Eighth Circuit's onerous pleading standard, fiduciaries have no need to make such a call.

Finally, Wells Fargo all but concedes that the same confusion has likewise now bled into lower courts' consideration of ESOP duty-of-loyalty claims. Courts, like the Eighth Circuit below, now apply their heightened pleading standard to both types of claims—even though doing so ignores the distinct statutory text and common-law principles on which each is based. This Court should grant review on that question, too.

ARGUMENT

I. The lower courts' sharp divide on the first question presented warrants this Court's review.

1. As our petition explained (at 18–25), the lower courts are no less divided in their interpretations of *Dudenhoeffer* today than they were when this Court granted certiorari in *Jander*.

Wells Fargo doesn't seriously dispute this point. It simply insists that the existing disagreement isn't implicated by the Eighth Circuit's opinion *at all*. So, it says (at 14–18), the Eighth Circuit left the conflict for another day by imposing only a "narrow" and "factbound" limitation on the pleading of duty-of-prudence claims.

That badly mischaracterizes the decision below. The Eighth Circuit *explicitly* endorsed the Fifth and Sixth Circuits' interpretations of *Dudenhoeffer*, holding that the "requisite pleading standard" in duty-of-prudence cases is a special, "demanding *Dudenhoeffer* standard" that differs from the normal standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2017), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). App. 11a, 12a & n.5, 15a.

Under that standard, courts are compelled to exclude certain allegations from consideration, draw inferences against ESOP plaintiffs, and adopt pro-fiduciary presumptions. *See, e.g.*, *Martone v. Robb*, 902 F.3d 519, 521, 526–27 (5th Cir. 2018) (discrediting allegations based on economic principles); *Graham v. Fearon*, 721 F. App'x 429, 436 (6th Cir. 2018) (speculating about the risks of a "market overreaction"); *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 865 (6th Cir. 2017) (drawing the inference

that corrective disclosure would hurt the fund more than the eventual reveal did).

Applying this same standard below, the Eighth Circuit took each of these steps. It (1) deemed allegations based on "general economic principles" "too generic" to plead a duty-of-prudence claim, (2) speculated that any disclosure would "spook[] the market," and (3) invoked a pro-fiduciary presumption that disclosure during a pending government investigation was necessarily imprudent. App. 11a–12a (cleaned up).

That approach directly conflicts with the one taken by the Second Circuit in *Jander*. There, of course, the Second Circuit explicitly rejected any stringent "*Dudenhoeffer* standard." Instead, it read *Dudenhoeffer* to *require* an application of the normal Rule 8 pleading standards and to prohibit drawing exactly the sorts of pro-fiduciary inferences or presumptions on which its fellow circuits rely. 910 F.3d at 631.[1]

2. These stark—and fundamental—disagreements are not, as Wells Fargo suggests (at 15), "narrow" and "factbound." In practice, the divergent approaches mean that the same allegations that, taken as true, plausibly plead a duty-of-prudence claim in the Second Circuit will be disregarded or dismissed as speculative elsewhere.

And, as this case itself demonstrates, those circuits that have adopted the stringent pleading standard have all used it to erect pro-fiduciary presumptions designed to categorically immunize ESOP fiduciaries from *any*

[1] The Second Circuit has not taken any steps to limit *Jander* to its facts, as Wells Fargo (at 18) seems to suggest. The court's cursory, unpublished disposition in *Varga v. General Electric Company*, 834 F. App'x 686 (2d Cir. 2021), sheds no additional light on the Second Circuit's approach.

liability. *See* App. 11a–12a (treating disclosure during a government investigation as necessarily imprudent); *Martone*, 902 F.3d at 521 (rejecting any allegations that could be made in any ESOP stock-drop case); *Graham*, 721 F. App'x at 436–37 (presuming that corrective disclosure will generally harm a fund).[2]

As a result, in circuits that read *Dudenhoeffer* to impose a "demanding" pleading standard, not a single ESOP duty-of-prudence claim has made it past the pleadings; those circuits' interpretation and application of the standard essentially immunizes ESOP fiduciaries from liability under ERISA. *See* App. 11a–12a; *Martone*, 902 F.3d at 521; *Graham*, 721 F. App'x at 436–37; *Saumer*, 853 F.3d at 865. In the Second Circuit, however, duty-of-prudence claims can not only survive the pleadings, but can lead to meaningful relief for participants. *See Jander v. Ret. Plans Comm. of IBM*, No. 15-cv-3781, Dkt. 111 (S.D.N.Y. Feb. 22, 2021) (notice of settlement in principle).

3. Wells Fargo's remaining attempts to downplay the confusion among the lower courts are just as unconvincing.

For instance, it argues (at 18) that *Dudenhoeffer* endorsed the "rigorous" pleading standard the Eighth Circuit applied below. Far from it. *Dudenhoeffer*

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[2] It is for this reason that Wells Fargo's focus on the Eighth Circuit's statement that it did not need to discount the plaintiffs' "general economic" allegations to dismiss this case is misplaced. The disagreement between the circuits is more fundamental than just this—it strikes at the very core of how, if ever, plaintiffs can plead a duty-of-prudence claim. But even so, the Eighth Circuit made its view on the treatment of economic allegations clear: It explicitly stated that they are too "generic" to plead a duty-of-prudence claim. App. 11a.

assiduously avoided imposing a heightened pleading standard, instead instructing that courts should "apply the pleading standard as discussed in *Twombly* and *Iqbal* in light of" a few commonsense considerations—that ERISA does not obligate fiduciaries to break securities laws, and that the market could react negatively to public disclosures of inside information. 573 U.S. at 425–30.

Wells Fargo is similarly mistaken in its insistence (at 19) that this Court has already "resolved" *Dudenhoeffer*'s lingering ambiguities. It says that this Court in *Amgen Inc. v. Harris,* 136 S. Ct. 758 (2016), definitively put to rest the puzzle noted in our petition (at 29–30)—specifically, whether courts should assess what a prudent fiduciary *would* have or *could* have thought of the plaintiff's proposed alternative action, and whether the Court meant anything by the two different formulations. But *Amgen* did nothing of the sort. While *Amgen* quoted the latter formulation, it did so only in passing and did not clarify the Court's meaning in *Dudenhoeffer* at all. *See* 136 S. Ct. at 760. That much is clear from this Court's own opinion in *Jander*, in which the Court reverted back to the "*would*" formulation. *See* 140 S. Ct. at 594 (explaining that the question presented in *Jander* "concerned what it takes to plausibly allege an alternative action 'that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it'" (quoting *Dudenhoeffer*, 573 U.S. at 428)).

All this has left the circuits to guess at this Court's meaning—which the Court should now step in to clarify.

II. None of the problems that emerged in *Jander* will derail review here.

This case likewise presents an ideal vehicle for the Court to pick up where it left off in *Jander*. Try as it might,

Wells Fargo fails to explain how any of the hurdles that arose there will be an obstacle here.

To begin with, this Court should not forestall review until the lower courts have specifically addressed whether the securities laws and ERISA impose congruent obligations. To be sure, in some cases that issue may well be dispositive. That's why this Court remanded in *Jander*. *See* 140 S. Ct. at 594. But it is no hurdle here because Wells Fargo has *admitted* to committing securities-law violations for the exact conduct at issue. *See In the Matter of Wells Fargo & Co.*, No. 3-19704, Order Instituting Cease-and-Desist Proceedings, Exchange Act Release No. 88257, at 3 ¶ 5, 12 ¶ 49 (Feb. 21, 2020), https://perma.cc/CYF3-NZ6E. That means that this case has cleared any potential securities-law hurdle, allowing the Court to address *Dudenhoeffer* without additional complications.

On this, the most that Wells Fargo can muster (at 21–22) is to claim that the scope of its securities liability is somehow uncertain because those cases settled instead of reaching judgment. That is wrong. The bank's consent judgment with the SEC explicitly admitted to violating the securities laws. *See id*. That admission aligns this case with the government's position in *Jander*: Here, ERISA would impose no disclosure obligations beyond what the securities laws did. *See Jander* Gov. Br. at 11.[3]

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[3] Lest there be any doubt, courts have *repeatedly* concluded that equivalent allegations against Wells Fargo suffice to sustain securities-law and state-law fiduciary-duty claims. *See Hefler v. Wells Fargo & Co.*, 2018 WL 1070116, at *5–11 (N.D. Cal. Feb. 27, 2018); *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 282 F. Supp. 3d 1074, 1091–1105 (N.D. Cal. 2017). That is more than sufficient to

Wells Fargo's other vehicle argument is just as weak. It says (at 20–21) that, until a *defendant* explicitly seeks to overrule *Dudenhoeffer*, this Court should refrain from clarifying the lower courts' considerable confusion over the meaning of that decision. But the lower courts are confused about the law *as it stands*. At this moment, the same allegations that would suffice to state a duty-of-prudence claim in one circuit would be thrown out in three others. That problem calls out for the Court's review now—regardless of whether reasons to reconsider *Dudenhoeffer* may emerge later. Nor is it likely that the case Wells Fargo urges this Court to wait for will ever come. Given that three circuits have already adopted what is, in effect, a complete pleading bar on ESOP duty-of-prudence claims, why would a fiduciary ever call for *Dudenhoeffer* to be formally overruled? In *Jander*, this Court granted review only to address *Dudenhoeffer*'s pleading standards, not anything else. *See Jander*, 140 S. Ct. at 594–95. Because that issue remains unresolved, the Court should grant this petition to address it.

III. The Eighth Circuit's plain error counsels in favor of review.

This Court should also step in to correct the Eighth Circuit's misreading of the Court's precedent—and of ERISA itself.

1. As we explained in our petition (at 31–32), the Eighth Circuit's arduous hurdle for recovery in ESOP duty-of-prudence claims is out of step with *Dudenhoeffer*'s instruction to apply the ordinary Rule 8 plausibility pleading standards. To take just one example, the Eighth

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support the inference that a prudent fiduciary would have found disclosure consistent with the securities laws.

Circuit's approach counterintuitively imposes an even higher hurdle on ESOP duty-of-prudence plaintiffs than those faced by plaintiffs asserting securities-fraud or state-law fiduciary-duty claims.

Wells Fargo's only response is to insist that there is no gap between ESOP participants and securities-fraud plaintiffs at all. According to the bank (at 21–22), ESOP participants can recover *through* its settlement with securities-fraud defendants.

That argument totally misses the point. If it were true that Wells Fargo employees could recover for the company's misdeeds under the *securities* laws, barring them from recovering under *ERISA* would be even more anomalous. After all, securities-fraud plaintiffs must meet the heightened pleading requirements of Rule 9. And Wells Fargo doesn't even try to reconcile the dismissal of the claims here with the survival of state-law fiduciary-duty claims against the bank's corporate insiders, which rely on "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). Meanwhile, under *Dudenhoeffer*, Rule 8's ordinary plausibility pleading standard is supposed to apply to duty-of-prudence claims—which manifestly should not make it "impossible . . . to state a duty-of-prudence claim." 573 U.S. at 422.

Yet somehow, under the Eighth Circuit's rule, an ESOP participant's only chance of recovering for fiduciary wrongdoing is under the securities laws, not ERISA. That cannot be right.[4]

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[4] And it is unlikely that participants can even recover via securities suits. The settlement notice Wells Fargo cites (at 23)

2. Wells Fargo's attempts to rehabilitate the Eighth Circuit's opinion (at 22–23) also fail.

Wells Fargo supposes, for instance, that a disclosure only could have occurred "outside normal corporate channels"—and that any disclosure that occurred before the culmination of a government investigation "would have signaled to the market that the issues were worse than they were."

That's just wrong. The plaintiffs don't allege that Wells Fargo had to disclose its issues "outside normal corporate channels"—they could have done so through regular corporate reporting practices, and, as necessary, in consultation with investigating entities. The Eighth Circuit simply improperly inferred otherwise.

Nor is there any reason to infer that an earlier disclosure would signal a deeper problem than the eventual reveal did. To the contrary, earlier disclosure that Wells Fargo had uncovered the problem, was actively investigating the issue itself, and was working toward a resolution would have enabled the company to showcase the steps it was taking to resolve the problem. Indeed, disclosure even might have curtailed the fraud itself by discouraging employees from persisting in it and alerting customers to the problem. But instead, the fiduciaries let the problem fester, and allowed investors' first news of the fraud to come from investigators' announcements of heavy penalties. A prudent fiduciary plausibly would have concluded that learning that information only at such a late hour inflicted more long-term damage to the

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actually *forbids* ESOP participants from submitting claims and, remarkably, leaves any plan participation up to the very fiduciaries who are here charged with acting imprudently. *See Hefler v. Wells Fargo & Co.*, No. 16-5479, Dkt. No. 225-1, Ex. A-1 at 14 (question 49).

company's reputation than would have occurred following a corrective disclosure.

Wells Fargo next argues (at 23) that disclosure risked leaving "open to conjecture" the outcome of the government investigations, which it surmises "could have caused long-term, disproportionate harm to the company." But there it again infers that the fiduciaries would have managed the disclosure poorly. And, if the outside possibility that a poorly managed disclosure could harm the fund is enough to undermine the plausibility of a plaintiff's duty-of-prudence claim, then it really is "impossible" to plead one.

Worse, as we explained in our petition (and above), and as Wells Fargo does not dispute, the Eighth Circuit's categorical government-investigations bar immunizes the worst corporate wrongdoing from ERISA (and *only* ERISA) liability. No understanding of *Dudenhoeffer* justifies such a result.

Bottom line: The Eighth Circuit applied its heightened pleading standard to set aside the complaint's detailed allegations—from the depth of the fraud to the fiduciaries' efforts to obscure or downplay it while benefitting personally, *see* App. 90a–103a, 115a–16a—in favor of a roving search for any conceivable reason that could justify the fiduciaries' failure to protect the fund. That is the opposite of what *Dudenhoeffer* calls for.

IV. This Court should also clarify related confusion about the duty of loyalty.

Wells Fargo's opposition to the second question presented is equally unpersuasive. It suggests (at 24) that the Eighth Circuit correctly dismissed the duty-of-loyalty

claim because it did nothing more than "recast allegedly imprudent acts as breaches of the duty of loyalty."

If that were so, Wells Fargo would have a point. But the prudence and loyalty claims here are undoubtedly distinct. The loyalty claim turns not on an allegation that it would have been *prudent* for the fiduciaries to make a corrective disclosure for the ESOP's benefit, but, rather, on an allegation that, in failing to disclose, the fiduciaries prioritized their own positions, including receiving "millions of dollars of bonuses and stock options" based on the very fraud they concealed. App. 124a–25a.

Indeed, it was the Eighth Circuit—not the plaintiffs—that ignored that distinction. Under its rule, plaintiffs can only state a duty-of-loyalty claim if they satisfy the same arduous reading of *Dudenhoeffer* that applies to prudence-based claims. *See* App. 14a–15a.

Wells Fargo all but concedes this, insisting (at 25) that it would render *Dudenhoeffer* "meaningless" to confine its reach to duty-of-prudence claims. Exactly wrong. This Court in *Dudenhoeffer* was clear that its guidance concerned only duty-of-prudence claims, not any and all claims that happen to involve ESOP fiduciaries, even those based on separate statutory provisions. *See Dudenhoeffer*, 573 U.S. at 419–25 (discussing the text and specific contours of ERISA's duty of prudence).

Wells Fargo's insistence that the lower courts aren't divided on this question also misses the point. The Court should review this question not because the lower courts are intractably split, but because this question is closely tied up with the first. Whatever the Eighth Circuit said it was doing, it also held that *any* loyalty-based duty to disclose "would circumvent" its "*Dudenhoeffer* standard." App. 14a–15a. That was doubly mistaken: *Dudenhoeffer*

does not impose a stringent pleading standard on duty-of-prudence claims, and that standard certainly does not extend to the distinct duty-of-loyalty context.

CONCLUSION

The petition for certiorari should be granted.

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